U.S. Department of Justice
Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

August 26, 2016

MEMORANDUM FOR AVI S. GARBOW, GENERAL COUNSEL, ENVIRONMENTAL PROTECTION AGENCY

Re: Authority of the Department of Defense to Reimburse the Hazardous Substance Superfund for Oversight Costs Incurred by the Environmental Protection Agency at the Twin Cities Army Ammunition Plant

You have asked us to resolve a dispute between the Department of Defense ("DoD") and the Environmental Protection Agency ("EPA") concerning DoD's authority to comply with an interagency agreement governing the cleanup of the Twin Cities Army Ammunition Plant.[1] In 1987, DoD and EPA entered a federal facility agreement ("FFA") pursuant to section 120(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675). That agreement allocates responsibility for the cleanup of hazardous substances at DoD's Twin Cities facility in Arden Hills, Minnesota. *See* Federal Facility Agreement Under CERCLA Section 120 in the Matter of: The U.S. Department of Defense's Twin Cities Army Ammunition Plant, Arden Hills, Minnesota and Impacted Environs (1987) ("Twin Cities FFA"). Under the terms of the agreement, DoD agreed to undertake the bulk of cleanup efforts at the facility. *Id.* § VIII. EPA, in turn, agreed to oversee those efforts. *Id.* §§ XIV, XVI, XXIV, XXV. And in section XXIX of the agreement, the parties agreed that DoD would reimburse the Hazardous Substance Superfund—the federal trust fund out of which EPA paid its oversight expenses—for the costs of EPA's oversight. *Id.* § XXIX.B, H-I.

DoD now contends that it cannot comply with its agreement to reimburse EPA's oversight costs. It argues that CERCLA and the statute establishing the Superfund, 26 U.S.C. § 9507, do not authorize DoD to consent to reimburse the Superfund for EPA's oversight costs; that several independent statutory restrictions and legal principles bar such reimbursements; and that DoD cannot make payments to the Superfund unless Congress specifically authorizes it to do so.[2] EPA disagrees, arguing both that section XXIX of the FFA is lawful and that DoD may

[1] Letter for Caroline D. Krass, Acting Assistant Attorney General, Office of Legal Counsel, from Avi S. Garbow, General Counsel, Environmental Protection Agency (Feb. 21, 2014) ("EPA Opinion Request").

[2] Letter for Karl R. Thompson, Acting Assistant Attorney General, Office of Legal Counsel, from Robert S. Taylor, Principal Deputy General Counsel, Department of Defense, *Re: Payment by Federal Agencies of Environmental Remediation Regulatory Oversight Costs of the U.S. Environmental Protection Agency (EPA)* (July 14, 2014) ("DoD Views").

make the payments required by that agreement out of an environmental restoration account established under 10 U.S.C. § 2703. *See* EPA Opinion Request at 3–10.[3]

For the reasons set forth below, we conclude that DoD had legal authority under CERCLA and 26 U.S.C. § 9507(b) to agree to section XXIX of the FFA; that no separate legal impediment of which we are aware prevents DoD from complying with that provision of the agreement; and that DoD may use funds in an environmental restoration account to reimburse the Superfund for oversight costs EPA incurred after the enactment of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011), but not for costs incurred prior to that date. In Part I, we describe the legal and factual background for our analysis. In Parts II, III, and IV, we explain each of our three conclusions in turn.

I.

A.

Congress enacted CERCLA in 1980 "to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citation omitted). To achieve these objectives, the statute imposes a series of obligations on the President and other entities that are triggered by the release or threatened release of hazardous substances, pollutants, and contaminants into the environment. *See, e.g.*, 42 U.S.C. §§ 9603–9604 (setting forth basic obligations). The statute also directs the President to develop a "national contingency plan" establishing supplemental "procedures and standards for responding to" such releases. *Id.* § 9605. The President has delegated many of his functions under the statute to EPA, which in turn has promulgated the required national contingency plan. *See, e.g.*, Exec. Order No. 12580, §§ 1(b)(1), 2(g), 9(a), 52 Fed. Reg. 2923, 2923–24, 2927 (1987) (delegating authority to EPA), *reprinted as amended in* 42 U.S.C. § 9615 note; 40 C.F.R. pt. 300 (national contingency plan).

Together, CERCLA and the national contingency plan set forth a comprehensive set of requirements and procedures that apply when a release occurs. They provide that, upon learning of a release at a vessel or facility in her charge, a person must "immediately notify" the federal government. 42 U.S.C. § 9603(a). A federal agency, usually EPA, must then conduct a preliminary assessment to determine the nature of the threat posed by the release. 40 C.F.R.

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[3] In considering these questions, we also obtained the views of the Environment and Natural Resources Division of the Department of Justice, the Department of Energy, the Department of the Interior, and the National Aeronautics and Space Administration. *See* Memorandum for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from John C. Cruden, Assistant Attorney General, Environment and Natural Resources Division, *Re: February 21, 2014 OLC Referral; Army authority to pay EPA CERCLA oversight costs* (Feb. 19, 2016) ("ENRD Views"); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Kedric Payne, Deputy General Counsel for Environment and Compliance, Department of Energy, *Re: Solicitation of Views* (Nov. 7, 2014 3:13 PM); Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Edward A. Boling, Deputy Solicitor, Parks and Wildlife, Department of the Interior (Nov. 3, 2014); E-mail for John Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Sumara M. Thompson-King, General Counsel, National Aeronautics and Space Administration, *Re: Solicitation of Views* (Oct. 6, 2014 3:27 PM).

§ 300.420. If the agency determines that there is an immediate need for a "removal action"—that is, an action to "cleanup or remov[e] . . . released hazardous substances from the environment," 42 U.S.C. § 9601(23)—it may initiate one promptly. 40 C.F.R. § 300.420(b)(3); *see id.* §§ 300.410, 300.415 (describing removal actions). If the agency determines that "long-term remedial evaluation and response" is required, it must consider whether the release should be placed on a National Priorities List ("NPL"). *Id.* § 300.425(b)–(c); *see id.* pt. 300, app. A (setting forth criteria for making this determination). Releases placed on the NPL are prioritized for "remedial action[s]," which are "actions consistent with *permanent* remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances." 42 U.S.C. § 9601(24) (emphasis added); 40 C.F.R. § 300.425(b).

In order to select the appropriate remedial action, the federal agency overseeing a cleanup conducts (or arranges for another party to conduct) a "[r]emedial investigation/feasibility study." 40 C.F.R. § 300.430; *see* 42 U.S.C. § 9604(a)(1). Once it has selected a remedial action, the agency may carry out the remedy itself, or it may agree that a party responsible for the contamination—known as a "responsible party"—will do so. *See* 42 U.S.C. §§ 9604(a)(1), 9622(a). In either case, section 107 of CERCLA provides that each responsible party, including the party that "owns or operates" the contaminated facility, is liable for "all costs of . . . remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." *Id.* § 9607(a).

Congress established a trust fund, the Hazardous Substance Superfund ("Superfund"), to fund many of the activities carried out by federal agencies overseeing environmental cleanups under CERCLA. 26 U.S.C. § 9507(a). Money is paid into the Superfund from certain dedicated taxes, penalties assessed under environmental statutes, and "amounts recovered on behalf of the Superfund under [CERCLA]"—including payments made by responsible parties under section 107. *Id.* § 9507(b); *see* 42 U.S.C. § 9607(c)(3) (stating that "[a]ny moneys received by the United States pursuant to this subsection shall be deposited in the Fund"). Money is authorized to be paid out of the Superfund for "governmental response costs incurred pursuant to" CERCLA, including the costs of removal actions, remedial actions, "enforcement activities related thereto," and any "administrative costs or expenses . . . reasonably necessary for and incidental to the implementation" of the statute. 42 U.S.C. §§ 9601(25), 9604(a)(1), 9611(a); *see* 26 U.S.C. § 9507(c). A federal agency cannot spend Superfund money, however, unless it has received an appropriation from Congress. *See* 26 U.S.C. § 9507(c)(1) (stating that "[a]mounts in the Superfund shall be available, *as provided in appropriation Acts*," for authorized purposes (emphasis added)). Congress typically appropriates money out of the Superfund in annual appropriations measures. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. F, tit. II, 128 Stat. 2130, 2423 (2014) (appropriating $1,088,769,000 from the Superfund to EPA for fiscal year 2015).

B.

In 1986, Congress substantially revised and expanded CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613. Among other changes, Congress added a new section 120, codified at 42 U.S.C. § 9620, which addresses the responsibilities of federal agencies in responding to releases of hazardous pollutants at facilities they own or operate.

Section 120 begins by stating that many of the Act's requirements apply to federal agencies and facilities in the same manner as they apply to other entities and facilities. Section 120(a)(1) provides that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under" section 107. 42 U.S.C. § 9620(a)(1). Section 120(a)(2) further provides that "[a]ll guidelines, rules, regulations, and criteria which are applicable" to various activities under CERCLA—including "preliminary assessments" of contaminated facilities, "evaluations of such facilities under the National Contingency Plan," "inclusion on the National Priorities List," and "remedial actions at such facilities"—are applicable to federal facilities "in the same manner and to the same extent as such guidelines, rules, regulations, and criteria are applicable to other facilities." *Id.* § 9620(a)(2); *see id.* § 9620(a)(3) (listing exceptions to these requirements).

Section 120 then sets forth a modified process for federal agencies to respond to releases of hazardous substances, pollutants, and contaminants at federal facilities. It states that, when information is received concerning a release at a federal facility, that information must be placed in a "Federal Agency Hazardous Waste Compliance Docket." *Id.* § 9620(c). EPA must "take steps to assure that a preliminary assessment is conducted for each facility on the docket." *Id.* § 9620(d)(1). Based on that preliminary assessment, EPA must then determine whether to "include such facilities on the National Priorities List." *Id.* § 9620(d)(1)(B). No more than six months after a facility has been added to the list, the agency that "owns or operates" the facility must, "in consultation with the [EPA] Administrator and appropriate State authorities," conduct a remedial investigation and feasibility study for that facility, which is in turn reviewed by the EPA Administrator. *Id.* § 9620(e)(1)–(2).

Section 120(e) provides that within 180 days of the completion of such a remedial investigation, the head of the agency must "enter into an interagency agreement with the [EPA] Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility." *Id.* § 9620(e)(2). Such an agreement is commonly referred to as a federal facility agreement, or FFA. The FFA must "include, but shall not be limited to," terms governing "[the] selection of a remedial action," "[a] schedule for the completion of each such remedial action," and "[a]rrangements for long-term operation and maintenance of the facility." *Id.* § 9620(e)(4). Section 120(e) also requires each agency that enters an FFA with EPA to submit to Congress a "review of alternative agency funding which could be used to provide for the costs of remedial action," and a report describing "[t]he specific cost estimates and budgetary proposals involved in each interagency agreement." *Id.* § 9620(e)(3), (5)(B). An agency must complete "[r]emedial actions at facilities subject" to an FFA "as expeditiously as practicable." *Id.* § 9620(e)(3).

C.

For several decades DoD has operated the Twin Cities Army Ammunition Plant in Arden Hills, Minnesota. In 1978, DoD discovered that "extensive waste disposal activities and use of radioactive materials" at the facility had contaminated the plant and surrounding areas. Twin Cities FFA § VII.5–8. EPA subsequently added the plant to the NPL. *Id.* § VII.13. In 1987, DoD and EPA entered into an FFA "pursuant to Section 120(e)(1)" of CERCLA to address the contamination. *Id.* § I(i), (iii).

This agreement provides that DoD is responsible for the bulk of cleanup efforts at the Twin Cities facility. *Id.* § VIII. EPA, in turn, is responsible for overseeing DoD's cleanup efforts. *Id.* §§ XIV, XVI, XXIV, XXV. Section XXIX of the FFA addresses the allocation of costs for these efforts. Section XXIX.H states that "after the end of each federal fiscal year," EPA is to submit to DoD an accounting for "costs incurred in performing oversight of this Agreement and costs of response actions related to the Site," including "costs associated with: (1) reviewing Submittals and work performed pursuant to this Agreement, (2) fulfilling their respective obligations under this Agreement, [and] (3) arranging for or contracting with a qualified person to assist in overseeing and reviewing the Submittals and work performed pursuant to this Agreement." *Id.* § XXIX.H. Section XXIX.I states that DoD must "reimburse U.S. EPA . . . in the amounts set forth in the accountings . . . in the same manner as set forth in Subpart[] B." *Id.* § XXIX.I; *see also id.* § VIII.7 (providing that DoD must "[r]eimburse the U.S. EPA for its costs, including ongoing oversight costs, pursuant to Part XXIX of this Agreement"). Subpart B in turn states that "[p]ayment to U.S. EPA shall be made by check payable to the order of: 'U.S. EPA Hazardous Substance Superfund.'" *Id.* § XXIX.B.

Since 1987, EPA has paid for its oversight activities at the Twin Cities facility out of the Superfund. *See* Letter for Danny Werfel, Deputy Controller, Office of Federal Financial Management, Office of Management and Budget, from Lyons Gray, Chief Financial Officer, EPA, encl. A at 1–2 (Aug. 13, 2008) ("Gray Letter"). In 1994, DoD reimbursed the Superfund approximately $4.1 million for EPA's response costs up to that time. *See* EPA Opinion Request at 1. Subsequently, however, DoD informed EPA that it believed it lacked authority to further reimburse the Superfund for EPA's response costs at the Twin Cities facility. *Id.* at 1–2. DoD did not make any such payments requested by EPA for the following 17 years. *Id.*

On January 7, 2011, Congress enacted the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011) ("2011 NDAA"). Section 311 of this statute provided that the Secretary of Defense was permitted to "transfer not more than $5,611,670.67 in fiscal year 2011 to the Hazardous Substance Superfund." *Id.* § 311(a)(1). The provision further stated that this money was to be transferred "to reimburse the Environmental Protection Agency for costs the Agency incurred relating to the response actions performed at the Twin Cities Army Ammunition Plant, Minnesota," and was "intended to satisfy certain terms of the interagency agreement entered into by the Department of the Army and the Environmental Protection Agency for the Twin Cities Army Ammunition Plant that took effect in December 1987 and that provided for the recovery of expenses by the Agency from the Department of the Army." *Id.* § 311(a)(2)–(3).

DoD subsequently transferred $5.61 million to the Superfund as provided in the 2011 NDAA. *See* EPA Opinion Request at 2. Since enactment of that statute, however, EPA has continued to submit accountings for its oversight costs, and DoD has continued to maintain that it lacks authority to pay those accountings. *Id.*; *see* Letter for Richard D. Hackley, Chief, Program Accounting & Analysis Section, EPA Region 5, from Michael R. Fix, Commander's Representative, Department of the Army at 1 (Mar. 7, 2013). DoD has not made any subsequent payments to the Superfund for EPA's oversight costs at the Twin Cities facility. EPA Opinion Request at 2.

II.

We first consider whether, leaving aside for the moment any limits imposed by principles of appropriations law and any other legal limits, CERCLA and 26 U.S.C. § 9507 by their own terms authorize DoD to agree to reimburse the Superfund for EPA's oversight costs at the Twin Cities facility. We believe that, under a straightforward reading, these statutes provide such authority.

As explained above, section 120(e) of CERCLA requires each agency that owns or operates a facility on the NPL to "enter into an interagency agreement with the [EPA] Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at" the contaminated facility. 42 U.S.C. § 9620(e)(2). Section 120(e)(4) further states that interagency agreements "shall include, *but shall not be limited to*," terms addressing "[the] selection of a remedial action," "[a] schedule for the completion of each such remedial action," and "[a]rrangements for long-term operation and maintenance of the facility." *Id.* § 9620(e)(4) (emphasis added). It is true that, as DoD contends, this language does not expressly state that agencies may agree to make transfer payments to the Superfund. *See* DoD Views at 10. However, as our Office has previously explained, section 120(e)(4) does plainly provide that agencies have the discretion to "inclu[de] in an interagency agreement . . . additional terms not listed in CERCLA section 120(e)(4)," including terms that go beyond the minimum requirements imposed by CERCLA. Letter for Daniel J. Dell'Orto, Principal Deputy General Counsel, Department of Defense, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Issuance of Imminent and Substantial Endangerment Orders at Department of Defense Facilities* at 3 (Dec. 1, 2008) ("Bradbury Memorandum"). Indeed, the statute's mandatory phrasing—providing that interagency agreements "*shall* not be limited" to the enumerated terms—and the fact that the statute specifies only a skeletal list of three required terms for interagency agreements make clear that Congress intended to leave the parties to interagency agreements free to specify additional terms.

And for several reasons, we believe that DoD's agreement to reimburse the Superfund for EPA's oversight costs is permitted by section 120(e). Starting with the text of section 120 itself, we think that DoD's agreement advances the stated purpose of an FFA: to ensure the "expeditious completion by [the] department, agency, or instrumentality [concerned] of all necessary remedial action" at a contaminated federal facility. 42 U.S.C. § 9620(e)(2); *see generally Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation, as we always say, begins with the text."). Congress repeatedly indicated in section 120 that it viewed EPA oversight as a critical means of ensuring the timely completion of remedial activities at federal facilities. Among other things, section 120(e) requires EPA to "publish a timetable and deadlines for expeditious completion" of remedial investigations and feasibility studies, 42 U.S.C. § 9620(e)(1); to "review the results of each investigation and study," *id.* § 9620(e)(2); and to either "reach agreement" with an agency "on selection of a remedial action" or, failing that, "select[]" an appropriate remedial action itself, *id.* § 9620(e)(4)(A). Section 120 also requires agencies to take steps, when transferring a federal facility on the NPL, to ensure that "required remedial investigations, response action, *and oversight activities* will not be disrupted." *Id.* § 9620(h)(3)(C)(ii)(II) (emphasis added); *see also id.* § 9620(h)(3)(B). These provisions reflect the commonsense notion that "[EPA] oversight ensures a . . . remedial action will be effective in

preventing, minimizing, and mitigating current or threatened releases." *United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161, 171 (3d Cir. 2005) (en banc). Consequently, it is reasonable for an agency to conclude that agreeing to reimburse the Superfund for EPA's oversight costs would also assist "the expeditious completion . . . of all necessary remedial action," both by guaranteeing that the Superfund has sufficient assets to permit EPA to conduct such oversight, and by reducing the chances that cleanup activities will be delayed by disagreements over payment.

Furthermore, multiple provisions of section 120 contemplate that an agency subject to section 120(e) may pay for the costs of EPA oversight. Section 120(e)(3) states that "[e]ach agency shall include in its annual budget submissions to the Congress a review of alternative agency funding which could be used *to provide for the costs of remedial action*" at "facilities subject to interagency agreements under this section." 42 U.S.C. § 9620(e)(3) (emphasis added). Section 120(h)(3) provides, similarly, that a deed or an agreement transferring a federal facility on the NPL must "provide that the Federal agency responsible for the property . . . will submit *a budget request* . . . that adequately addresses schedules for investigation and completion of *all necessary response action*." *Id.* § 9620(h)(3)(C)(ii)(IV) (emphases added). As all courts to have considered the question agree, "remedial actions" and "response actions" under CERCLA include EPA's activities in overseeing such actions. *See E.I. DuPont de Nemours*, 432 F.3d at 166 & n.9, 171–72; *see also* EPA Opinion Request at 4 n.3, 6 n.6. Among other reasons, that is because CERCLA defines both "remedial action" and "response action" to "include[] . . . any monitoring reasonably required to assure that [remedial] actions protect the public health and welfare and the environment" as well as "enforcement activities related thereto," 42 U.S.C. § 9601(24)–(25), and as numerous courts have explained, the terms "monitoring" and "enforcement activities" are "most reasonably read to encompass [EPA] oversight." *E.I. DuPont de Nemours*, 432 F.3d at 171, 173–74; *see United States v. Lowe*, 118 F.3d 399, 403 (5th Cir. 1997); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 569–70 (10th Cir. 1996); *see also United States v. Dico, Inc.*, 266 F.3d 864, 876–78 (8th Cir. 2001) (concluding that oversight is "monitoring" but not addressing whether it is an "enforcement activit[y]"); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985) (concluding without discussion that oversight costs "squarely fall within CERCLA's definition of response costs"). Accordingly, section 120(e)(3) contemplates that agencies that own or operate NPL facilities may "provide for the costs" of EPA oversight, 42 U.S.C. § 9620(e)(3), while section 120(h)(3) states that agencies must, in certain circumstances, request funds to "address . . . [the] completion of" EPA oversight, *id.* § 9620(h)(3)(C)(ii)(IV). It is therefore appropriate, at a minimum, for an agency to agree to include a term providing for such payment in an interagency agreement—particularly given that section 120(e)(5) contemplates that an "interagency agreement" may "involve[]" "cost estimates and budgetary proposals." *Id.* § 9620(e)(5)(B).

The conclusion that section 120(e) authorizes an agency to agree to reimburse the Superfund for EPA's oversight costs also draws support from the "broader context provided by other sections of the statute." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997). A number of related provisions of CERCLA expressly authorize entities responsible for the cleanup of contaminated facilities to agree to reimburse the Superfund for EPA's oversight costs. Section 104(a)(1), for example, states that the President (and thus his delegee, EPA) may "allow [a responsible party] to . . . conduct the remedial investigation" for a contaminated site if the President "contracts with or arranges for a qualified person to assist the President in overseeing

and reviewing the conduct of such [remedial investigation] *and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement.*" 42 U.S.C. § 9604(a)(1) (emphasis added); *see* Exec. Order No. 12580, § 2(g) (generally delegating to EPA the "functions vested in the President by Section[] . . . 104(a)"). Similarly, section 122(b) provides that a responsible party may agree as part of a settlement or consent agreement that "the President will . . . carry[] out" certain actions and "the parties will . . . pay[] amounts to the President" in return. 42 U.S.C. § 9622(b)(3). One of the "actions" that the President is expressly authorized to carry out using Superfund assets is "oversight of remedial activities": section 111 provides that the President may "use the money in the [Superfund]" to pay for "the costs of appropriate Federal . . . *oversight of remedial activities* at National Priorities List sites resulting from consent orders or settlement agreements." *Id.* § 9611(a), (c)(8) (emphasis added); *see* 40 C.F.R. § 300.400(h) (stating that "EPA will provide oversight when [a] response is pursuant to an EPA order or federal consent decree"). Hence, section 122(b) permits responsible parties to agree to "pay[] amounts" to compensate the Superfund for the costs of "Federal . . . oversight."

It is true that these provisions are not directed specifically at federal facilities, and that environmental cleanup at federal facilities is governed by the special requirements set forth in section 120. Nonetheless, it would in our view be surprising if section 120(e), in granting to agencies the discretion to select the terms of FFAs, did not permit agencies that own or operate facilities on the NPL to agree to the same kinds of arrangements for reimbursement of oversight costs that CERCLA specifically permits private responsible parties to make. There is nothing in section 120 or elsewhere in CERCLA that suggests federal agencies cannot exercise their apparently broad discretion under section 120(e) to agree to these kinds of terms. Moreover, as noted above, section 120(a)(1) states that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." 42 U.S.C. § 9620(a)(1). Whatever the full scope and meaning of this provision—something we need not decide here—it at minimum suggests that section 120(e) should be read to permit the parties to an FFA to choose to make arrangements that CERCLA elsewhere expressly contemplates that private responsible parties may make.

Our reading of section 120(e) is further reinforced by CERCLA's basic "structure[] and purpose." *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014). As the Supreme Court has explained, CERCLA was designed "to ensure that the costs of . . . cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry.*, 556 U.S. at 602. To further that purpose, section 107(a) provides that each responsible party at a facility—including "the owner and operator of . . . a facility"—shall be "liable for . . . all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(1), (4)(A). "Any moneys received by the United States" under this provision are to be "deposited in the [Superfund]." *Id.* § 9607(c)(3). Hence, an owner or operator of a facility ordinarily *must* reimburse the Superfund for EPA's removal and remedial costs—which, as we have explained, include the costs of oversight. *See, e.g.*, *E.I. DuPont de Nemours*, 432 F.3d at 171. It would be anomalous if CERCLA prohibited DoD from

voluntarily assuming an obligation in an interagency agreement under section 120(e) that the statute generally makes mandatory for private owners and operators.[4]

Finally, our conclusion that agencies—and, in particular, DoD—may lawfully agree to reimburse the Superfund for EPA's oversight costs is buttressed by a number of later-enacted measures in which Congress has specifically set aside funds with which DoD may pay such reimbursements. *See Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 332 (2000) ("The Supreme Court has recognized that, as a general matter, appropriation statutes may 'stand[] as confirmation and ratification of the action of the Chief Executive.'" (quoting *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947))). Four separate statutes have authorized DoD to transfer specified amounts to the Superfund "to reimburse the Environmental Protection Agency for its costs incurred in overseeing a remedial investigation/feasibility study performed by the Department of the Army . . . at the former Larson Air Force Base . . . [as] provided for in the interagency agreement entered into by the Department of the Army and the Environmental Protection Agency for the Moses Lake Wellfield Superfund Site." Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 312(a), 122 Stat. 4356, 4409 (2008); *see* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 311, 122 Stat. 3, 59 (2008); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 315(a), 120 Stat. 2083, 2141 (2006); Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 312(a), 118 Stat. 1811, 1842 (2004). Two statutes have authorized DoD to reimburse the Superfund as "provided for in an interagency agreement" for "all costs incurred [by EPA] in overseeing a time critical removal action performed by the Department of Defense" at a DoD facility. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 315(a), 123 Stat. 2190, 2248 (2009); *see* Floyd W. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 316(a), 114 Stat. 1654, 1654A-56 (2000). And as noted above, in the 2011 NDAA Congress specifically authorized DoD to transfer money to the Superfund "to reimburse the Environmental Protection Agency for costs incurred relating to the response actions performed at the Twin Cities Army Ammunition Plant," and thereby to "satisfy certain terms of the" Twin Cities FFA. 2011 NDAA § 311(a). Each of these provisions appears to have been premised on the view that DoD could lawfully agree to reimburse the Superfund for EPA's oversight costs, and indeed each one sought to ensure that DoD complied with such agreements. They therefore lend additional support to the view that an agreement pursuant to section 120(e) to reimburse EPA's oversight costs at federal facilities on the NPL is lawful. *Cf. Bilski v. Kappos*, 561 U.S. 593, 607 (2010) (drawing support for the conclusion that business methods are patentable from "the fact that federal law explicitly contemplates the existence of at least some business method patents"); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595 (1980) (finding the conclusion that certain transactions are lawful "buttressed" by the fact that in later enactments "Congress seems clearly to have contemplated" such transactions).

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[4] EPA and DoD argue at length over whether sections 107 and 120(a) *require* DoD to reimburse the Superfund for EPA's oversight costs. *See* DoD Views at 7–10; EPA Opinion Request at 3–6. We need not resolve that issue here. It suffices to resolve the present dispute that, for the reasons we have given, DoD is at least *permitted* under section 120(e) to agree in an FFA to pay such reimbursements.

For these reasons, we think section 120(e) permits DoD to agree to reimburse the Superfund for EPA's oversight costs. And we think it follows from this conclusion that, to the extent DoD has an appropriation available for these expenditures (an issue we discuss below in Part IV), 26 U.S.C. § 9507(b) likewise authorizes DoD to make those payments into the Superfund. Section 9507(a) of title 26 establishes the Superfund as "a trust fund" "in the Treasury of the United States," and provides that it "consist[s] of such amounts as may be," among other things, "appropriated to the Superfund as provided in this section." 26 U.S.C. § 9507(a). Section 9507(b) in turn provides that "[t]here are hereby appropriated to the Superfund amounts equivalent to . . . amounts recovered on behalf of the Superfund under [CERCLA]." *Id.* § 9507(b)(2). Section 9507(b) thus permits DoD to pay amounts that will be credited to the Superfund as reimbursement for EPA's oversight costs, so long as those amounts are "recovered on behalf of the Superfund under [CERCLA]."[5] And we believe they are. As discussed above, EPA paid for the costs of its oversight at the Twin Cities facility out of the Superfund. *See* Gray Letter at 1–2. Thus, DoD's agreed-upon payments into the Superfund, which would reimburse these costs, would be "recovered on behalf of the Superfund" within the plain meaning of those terms. *See* Webster's New World College Dictionary 1214 (5th ed. 2014) (defining "recover" to mean "get back" or "compensate for; make up for"). And they would be recovered "under [CERCLA]," because they would be paid pursuant to an agreement lawfully entered under section 120(e) of that statute. Like section 120(e), then, 26 U.S.C. § 9507 provides authority for DoD to consent to section XXIX of its FFA.

DoD argues that "a transfer of appropriated funds" is not a "recovery" as that term is used in section 9507, because "the United States does not recover funds from itself." DoD Views at 11. The phrase "recovered on behalf of the Superfund," however, does not provide any basis for distinguishing between money reimbursed to the Superfund from within the federal government and money reimbursed from outside the government: on its face, "recover[y]" merely refers (at a minimum) to the repayment of money that was previously withdrawn from the Fund. Furthermore, in a 1991 memorandum, our Office specifically concluded that a payment from the United States to the Superfund was a "recovery" within the meaning of this statute. *See* Memorandum for Barry M. Hartman, Deputy Assistant Attorney General, Environment and Natural Resources Division, from John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Contribution Claims Against Federal Agencies Under CERCLA* (Mar. 19, 1991) ("Harrison Memorandum"). We explained that where the government agrees that it bears some share of responsibility for EPA's response costs—whether by virtue of a "judgment or settlement"—it should reimburse the Superfund from the federal government's Judgment Fund, and that such a payment constitutes "'amounts recovered on behalf of the Superfund' under 26 U.S.C. § 9507(b)(2)." *Id.* at 4–6. This view also accords with longstanding practice: the Environment and Natural Resources Division has informed us that "the United States routinely agrees to pay a share of EPA's oversight costs from the Judgment Fund to reflect the United States' share of liability based on actions of a federal agency responsible party," and that the government often pays those costs "directly" from the Judgment Fund to the Superfund. ENRD Views at 13. Moreover, since 1987 the President has directed

[5] We have not been asked about, and express no view on, the technical steps through which any reimbursement paid by DoD should ultimately be credited to the Superfund.

that if Superfund assets are used "to pay for removal actions" at federal facilities, those funds "must be reimbursed to the Hazardous Substance Superfund *by such Executive department or agency*." Exec. Order No. 12580, § 9(i) (emphasis added). We therefore do not believe that 26 U.S.C. § 9507(b) bars the federal government, or individual federal agencies, from making payments of amounts to be credited to the Superfund.

In sum, we conclude that section 120(e) of CERCLA permits federal agencies to agree to reimburse the Superfund for the costs of EPA oversight at federal facilities, and that those payments comply with the limitations on Superfund appropriations in 26 U.S.C. § 9507(b). We therefore conclude that CERCLA and 26 U.S.C. § 9507(b) authorized DoD to agree to reimburse the Superfund for the costs of EPA's oversight at the Twin Cities facility, as provided in section XXIX of the FFA.

III.

We next consider whether any other legal impediment prevents DoD from transferring money to the Superfund to reimburse EPA for its oversight costs, as provided in section XXIX of the FFA. DoD identifies several statutes and principles of appropriations law that it believes bar it from complying with the agreement. But as explained below, we do not agree that those statutes or principles would prohibit DoD from fulfilling its obligations under section XXIX.

DoD first argues that a payment from DoD to the Superfund would constitute an improper augmentation of EPA's appropriations, in violation of the anti-augmentation principle of federal appropriations law. *See* DoD Views at 10, 12–13. As the Comptroller General has explained, the anti-augmentation principle holds that, "[a]s a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority." 2 General Accountability Office, *Principles of Federal Appropriations Law* 6-162 (3d ed. 2006) ("GAO Redbook"); *see id.* (explaining that such an augmentation would "amount to a usurpation of the congressional prerogative" by allowing an agency to expend more funds than Congress has specifically appropriated it).[6] The Superfund, however, is not an "appropriation" to EPA or any other agency. Rather, it is a "trust fund" whose assets EPA may expend only "as provided in appropriation Acts." 26 U.S.C. § 9507(a), (c)(1). Thus, a payment to the Superfund does not itself increase the amount of appropriations available to EPA. Congress must specifically appropriate such funds to make them available for expenditure. *See, e.g.*, *Matter of: The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 73 Comp. Gen. 46, 48 (1993) (stating that "EPA may not re-use . . . amounts [deposited into the Superfund] without further appropriation action"). Payments to the Superfund therefore do not implicate the anti-augmentation principle. *Cf. Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies*, 15 Op. O.L.C. 74, 78 (1991) ("*Authority of the Nuclear Regulatory Commission*") (explaining that annual charges collected from other federal agencies and "deposited into the general fund of the

[6] Although the opinions and legal views of the Comptroller General "are not binding upon departments or agencies of the executive branch," we have considered them "useful sources on appropriations matters." *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997).

Treasury" do not "augment the [Nuclear Regulatory Commission's] budget" because they "are not appropriated funds and are not available for expenditure").

DoD contends that a 1989 memorandum from the Office of Management and Budget ("OMB") took a contrary position. *See* DoD Views at 13. That memorandum—which runs to only half a page—states that OMB "would advise against" including, in certain unspecified compliance agreements overseen by the Department of Energy, mandatory provisions in which government agencies would agree to "reimburse EPA for its role in overseeing and approving response actions." Memorandum for Leo Duffy, Assistant Secretary, Office of Environmental Restoration and Waste Management, Department of Energy, from Robert E. Grady, Associate Director, Office of Management and Budget, *Re: Question About Reimbursing EPA* (Oct. 17, 1989). Such payments, OMB reasoned, would amount to "an augmentation of the EPA budget by appropriations intended for activities of other agencies." *Id.* Assuming that this advice is correct—a question on which we express no view—we think it addresses a distinct question. The memorandum does not refer to the Superfund at all, but instead refers to payments to "EPA" that would augment "the EPA budget." This language suggests that the memorandum was addressing potential transfers that would make funds directly available to EPA. As we have explained, payments to the Superfund are not available directly to "EPA" and do not increase "the EPA budget," absent an additional appropriation from Congress. The OMB memorandum thus appears not to have addressed the situation, or contested the conclusion, at issue here.

DoD next argues that 10 U.S.C. § 2215 prohibits it from transferring payments to the Superfund. *See* DoD Views at 14–15. That statute provides that "[f]unds available for military functions of the Department of Defense may not be made available to any other department or agency of the Federal Government pursuant to a provision of law enacted after November 29, 1989" unless the Secretary of Defense certifies that "making those funds available to such other department or agency is in the national security interest of the United States." 10 U.S.C. § 2215. However, as just discussed, a transfer of funds to the Superfund does not make funds "available to any other department or agency" absent a separate, intervening appropriation by Congress. Such a transfer therefore does not fall within this statute's terms.[7]

Finally, DoD argues that reimbursement to the Superfund would be improper because it would entail "reimbursement of expenses to another Federal agency for providing work within that agency's area of responsibility." DoD Views at 3. To the extent, however, that there is a general principle prohibiting such payments—a question we do not address—it would not apply in this circumstance, as a reimbursement to the Superfund is not a payment "to another Federal agency" but rather to a trust fund whose assets EPA may expend only when separately appropriated funds by Congress. Moreover, we have repeatedly concluded that agencies may pay one another for providing services within the scope of their statutory responsibilities where

[7] For a similar reason, we conclude that 31 U.S.C. § 1532 does not prohibit DoD from making reimbursements to the Superfund. *See* EPA Opinion Request at 6–7 (discussing this statute). This statute provides that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31 U.S.C. § 1532. We have previously explained that this statute restricts payments only to accounts or funds in which assets are "available for expenditure." *Authority of the Nuclear Regulatory Commission*, 15 Op. O.L.C. at 78. Because the Superfund is a trust fund whose assets are not available for expenditure without a separate appropriation, it does not fall within the scope of this statute.

they are expressly or implicitly authorized by statute to do so. *See, e.g.*, *Authority of the Nuclear Regulatory Commission*, 15 Op. O.L.C. at 77–78 & n.7 (concluding that a statute authorizing the Nuclear Regulatory Commission to collect annual charges from licensees permitted it to collect annual charges from federal agencies "even though the authorizing statutory section does not expressly reference government agencies"); Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Recovery of Costs of Representing Copyright Royalty Tribunal in Distribution Disputes Pursuant to 17 U.S.C. § 111* (July 1, 1983) (concluding that the Copyright Royalty Tribunal may reimburse the Civil Division for litigation expenses pursuant to a statute authorizing payment of "reasonable costs" for copyright proceedings). As we have explained, we think that CERCLA makes clear that agencies may agree to make payments to the Superfund for EPA's oversight costs pursuant to section 120(e). *See supra* Part II. We therefore find that none of the legal restrictions DoD identifies would prohibit it from complying with section XXIX of the FFA.

IV.

We now consider whether DoD requires specific authorization from Congress to reimburse the Superfund for EPA's oversight costs under section XXIX of the FFA. As we explain below, we believe that DoD may expend funds to reimburse the Superfund for costs EPA incurred subsequent to the enactment of the 2011 NDAA, but that DoD would require specific authorization to further reimburse the Fund for costs incurred prior to that date.

Two statutes provide the relevant framework for analyzing this question. The first, 10 U.S.C. § 2703, establishes "[e]nvironmental restoration accounts" for DoD and each of its military departments. 10 U.S.C. § 2703. These accounts are funded in part from annual appropriations, as well as from amounts DoD has "recovered under CERCLA for response actions" and reimbursements the agency has received for its other "environmental response activities." *Id.* § 2703(e); *see, e.g.*, 2011 NDAA § 301(14)–(18) (authorizing additional amounts to be appropriated to such accounts). Congress has provided that funds from these accounts "may be obligated or expended from the account only to carry out the environmental restoration functions of the Secretary of Defense and the Secretaries of the military departments under this chapter and under any other provision of law." 10 U.S.C. § 2703(c)(1). Moreover, these accounts are (with one exception not relevant here) "the *sole* source of funds for all phases of an environmental remedy at a site under the jurisdiction of the Department of Defense or a formerly used defense site," where the term "environmental remedy" has the same meaning as "remedy" or "remedial action" under CERCLA. *Id.* § 2703(g)(1)–(2), (h) (emphasis added); *see* 42 U.S.C. § 9601(24) (giving "remedy" the same definition as "remedial action"). Accordingly, 10 U.S.C. § 2703 makes environmental restoration accounts a source—and, by the statute's terms, the only source—for the payment of "remedial costs" by DoD at DoD facilities.

The second relevant statute is 31 U.S.C. § 1301(a), commonly known as the Purpose Act. This statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); *see id.* § 1301(d) (stating that "[a] law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made"). As the Comptroller General has explained, a law appropriates funds within the meaning of the Purpose

Act if it "makes funds available to an agency to incur obligations and make expenditures." 1 GAO Redbook at 2-16 (3d ed. 2004); *accord* 31 U.S.C. § 701(2) (defining the term "appropriations" for purposes of a related statute to include "authority making amounts available for obligation or expenditure"). As noted above, 10 U.S.C. § 2703(c) provides, in almost precisely those terms, that funds in an environmental restoration account "may be obligated or expended from the account . . . to carry out the environmental restoration functions of the Secretary of Defense." 10 U.S.C. § 2703(c)(1); *see also id.* § 2703(c)(2) (stating that such funds "shall remain available until expended"). It makes no difference that this authorization is contained in permanent legislation rather than an annual appropriations act. Congress may make appropriations through either type of statute, *see* 1 GAO Redbook at 2–14 & n.26, and both we and the Comptroller General have found the Purpose Act applicable to permanent appropriations, *see, e.g.*, *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. O.L.C. 127, 136 n.11 (1995) (concluding that the Purpose Act is applicable to the permanent trust fund appropriation contained in 31 U.S.C. § 1321(b)); *Matter of: Expenses of President's Commission on Executive Exchange*, 63 Comp. Gen. 110, 111–12 (1983) (applying the Purpose Act to a permanent revolving fund appropriation contained in 5 U.S.C. § 1304 (1982)). Accordingly, expenditures from the appropriation in 10 U.S.C. § 2703(c) are subject to the limits in the Purpose Act.

Both this Office and the Comptroller General have interpreted the Purpose Act to authorize an agency to expend appropriations for any "necessary expense." *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 35 Op. O.L.C. __, at *8 (Mar. 5, 2012) ("*State and Local Deputation*"), *available at* http://www.justice.gov/olc/opinions.htm. We have explained that an expenditure is "necessary" if (1) "the agency believes that [the] expenditure bears a logical relationship to the objectives of the . . . appropriation, and will make a direct contribution to the agency's mission"; and (2) "some 'specific provision [does not] limit[] the amount that may be expended on a particular object or activity within [the] . . . appropriation.'" *Id.* (quoting *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 153–54, 156 (1997) ("*Employee Business Cards*")). The Comptroller General has adopted a three-part test that "mirrors" our own. *Id.* That test holds that an expense is "necessary" if (1) it "bear[s] a logical relationship to the appropriation sought to be charged" by "mak[ing] a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available"; (2) it is not "prohibited by law"; and (3) it is not "otherwise provided for" by "some other appropriation or statutory funding scheme." 1 GAO Redbook at 4-21–22. Thus, the relevant inquiry for our purposes is whether DoD's expenditure of funds in an environmental restoration account to reimburse the Superfund for EPA's oversight costs would comply with the elements of these tests.

Such an expenditure would satisfy the first element of both this Office's and the Comptroller General's formulation of the necessary expense doctrine—that is, it would "bear a logical relationship" and "make a direct contribution" to the objectives of the environmental restoration account appropriation. As noted above, 10 U.S.C. § 2703 authorizes DoD to expend environmental restoration account funds to "carry out the environmental restoration functions of the Secretary of Defense . . . under any . . . provision of law." 10 U.S.C. § 2703(c)(1). As a federal statute, section 120(e) of CERCLA is a "provision of law." *See Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009) (stating that a federal statute is "indisputably" a "provision of

law"). That provision assigns DoD the environmental restoration function of "complet[ing] . . . all necessary remedial action" at the Twin Cities facility. 42 U.S.C. § 9620(e)(2). And EPA's oversight is designed to ensure that DoD fully and effectively fulfills that statutory responsibility. *See supra* pp. 6–7 ("[EPA] oversight ensures a . . . remedial action will be effective in preventing, minimizing, and mitigating current or threatened releases." (quoting *E.I. DuPont de Nemours*, 432 F.3d at 171)). Hence, expending funds to support EPA's oversight activities at Twin Cities would "bear a logical relationship" and "make a direct contribution" to the environmental restoration accounts' stated purpose of enabling DoD to "carry out [its] environmental restoration functions." *Cf. EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, 24 Op. O.L.C. 84, 90 (2000) (concluding that "the payment of administrative expenses in the course of implementing a statutory program, such as statutorily-authorized administrative penalties assessed by another federal agency, constitutes a cost of doing business and therefore" satisfies the first element of the necessary expense doctrine).

Such an expenditure also satisfies the second element of the Comptroller General's test. As explained above, there appears to be no statutory provision that "prohibit[s]" DoD from reimbursing the Superfund for EPA's oversight costs. *See supra* Part III.

Analysis of the final element of this Office's and the Comptroller General's tests is more complicated. As both of these tests reflect, an agency may not use one source of budget authority to pay for an object or activity for which Congress has specifically set aside a limited amount of funds in another statute; in that circumstance, such an expenditure would effectively negate the limitations Congress imposed in the latter statute. *See State and Local Deputation* at *8, *11 n.12; 1 GAO Redbook at 4-29–30. And here, Congress specifically addressed reimbursements for at least some of EPA's oversight costs at the Twin Cities plant in section 311 of the 2011 NDAA. As noted above, this statute authorized DoD to transfer "not more than $5,611,670.67 in fiscal year 2011 to the Hazardous Substance Superfund . . . to reimburse the [EPA] for costs the Agency incurred relating to the response actions performed at the Twin Cities Army Ammunition Plant, Minnesota," and stated that this reimbursement was "intended to satisfy certain terms" of the Twin Cities FFA. 2011 NDAA § 311(a)(1)–(3). In DoD's view, this provision both "settled any question as to additional payment of . . . oversight costs incurred prior to its enactment" at the Twin Cities facility and demonstrates "the need . . . for DoD to obtain specific authorization for payment of EPA oversight costs." DoD Views at 7.

We agree that section 311 of the 2011 NDAA limits the amount of funds DoD may expend to reimburse the Superfund for EPA oversight costs incurred *prior* to the enactment of that statute. The statute authorized DoD to transfer a specified amount to the Superfund "to reimburse the [EPA] for costs the Agency *incurred*," a past-tense verb that most naturally refers to costs incurred prior to the statute's enactment. 2011 NDAA § 311(a)(2) (emphasis added); *cf. Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (stating that "we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach," and concluding that "a present-tense verb" does not "reach preenactment conduct"). And it stated that this reimbursement was "intended to *satisfy* certain terms of the" Twin Cities FFA—or, in other words, to entirely fulfill DoD's obligation under the FFA to reimburse EPA for past costs. 2011 NDAA § 311(a)(3) (emphasis added); *see* Webster's New World College Dictionary 1291 (defining "satisfy" to mean "to fulfill or answer the requirements or conditions of"). The

statute's Senate report underscores both points; it states that section 311 was intended to "reimburse the [EPA] for *past costs* relating to the response actions performed at the Twin Cities Army Ammunition Plant" and to "*fully satisfy* the costs incurred by EPA" at Twin Cities. S. Rep. No. 111-201, at 101 (2010) (emphases added). It is difficult to envision how section 311 would "satisfy" any terms of DoD's obligation to reimburse EPA for costs it had "incurred" prior to the statute's enactment if DoD were required under the FFA to continue to spend other appropriated funds to pay for those expenses. We therefore think section 311 establishes that Congress intended its authorization to pay for EPA oversight costs incurred prior to the 2011 NDAA to be exclusive. *Cf. State and Local Deputation* at *11 n.12 (concluding that the Emergency Federal Law Enforcement Assistance Act ("EFLEA") does not limit the President's authority to use Stafford Act funds to provide emergency assistance because "Congress has clearly indicated that EFLEA is not exclusive, even where it applies"). DoD consequently may not make additional payments for such past costs using an environmental restoration account, at least absent specific authorization from Congress.

However, we do not believe that section 311 precludes DoD from expending funds to pay for oversight costs incurred by EPA *after* enactment of the 2011 NDAA. As just discussed, section 311 addressed only past costs: it authorized the transfer of funds "to reimburse the [EPA] for costs the Agency *incurred*," 2011 NDAA § 311(a)(2) (emphasis added), and the statute's Senate report states that section 311 would "reimburse the [EPA] for *past costs*," S. Rep. No. 111-201, at 101 (emphasis added). This statute thus does not appear to address DoD's obligation to reimburse EPA for costs incurred after the date of its enactment.[8] Accordingly, DoD would not exceed any limitations on expenditures implicit in the 2011 NDAA by expending funds in an environmental restoration account to pay for EPA oversight costs that postdate the statute.

DoD disagrees with this conclusion, arguing that Congress "recognized the need, by enacting section 311 of the 2011 National Defense Authorization Act, for DoD to obtain specific authorization for payment of EPA oversight costs." DoD Views at 7. But the fact that Congress expressly authorized DoD to expend funds for a given purpose does not necessarily imply that the agency otherwise lacked that authority. Congress may have enacted section 311 simply to resolve uncertainty concerning DoD's authority to make past payments—an inference that is particularly plausible given the 17-year dispute between DoD and EPA on this point. *See* EPA Opinion Request at 1–2; DoD Views at 3–4; *cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 n.7 (1994) (concluding that Congress enacted a statute "to clarify what had been at best unclear"). Moreover, appropriations measures often authorize or direct the expenditure of funds for specific purposes that would otherwise appear to constitute "necessary expenses" payable under more general appropriations. *See, e.g.*, *Employee Business Cards*, 21 Op. O.L.C. at 156

[8] Section 311's statement that "[t]he reimbursement" it authorizes "is intended to satisfy certain terms of the" Twin Cities FFA, 2011 NDAA § 311(a)(3), is not to the contrary. As discussed above, other language in section 311 and its legislative history make clear that the transfer authorized by section 311 was intended to reimburse EPA for the "past costs" it had "incurred" in overseeing DoD's response actions at the Twin Cities facility, *id.* § 311(a)(2); S. Rep. No. 111-201, at 101, not to cover future costs incurred after section 311 was enacted. *Accord* DoD Views at 6 (noting that the payment authorized by section 311 covered "all costs through fiscal year 2011").

(authorization to expend funds "for official reception and representation expenses" (quoting Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009–336 (1996))). We do not think it plausible that each time Congress makes a specific appropriation, it implies that an agency is prohibited from using other appropriated funds for the same purpose in any subsequent fiscal year. Rather, the necessary expense doctrine remains the appropriate standard to assess whether subsequent appropriations could be used to fund a particular activity.[9]

We thus conclude that although DoD may not use the funds in an environmental restoration account to pay for EPA oversight expenses incurred prior to the enactment of the 2011 NDAA, it may use such funds to pay for oversight expenses incurred after that date.

V.

For the foregoing reasons, we conclude that it was lawful for DoD to agree to reimburse the Superfund for the costs of EPA oversight at its Twin Cities facility. We are aware of no legal restriction prohibiting DoD from fulfilling that agreement. And DoD may use an environmental restoration account to reimburse the Superfund for EPA oversight expenses incurred after, but not before, the enactment of the 2011 NDAA.

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[9] The remaining arguments for DoD's position are similarly unconvincing. The Senate report accompanying the 2011 NDAA states, in its explanation of section 311, that "the Army has not reimbursed the EPA *apparently because the Army lacked the authority to transfer the funds*." S. Rep. No. 111-201, at 101 (emphasis added). It is not at all clear that this statement is intended to be an endorsement of DoD's position, rather than merely a recitation of DoD's stated reason for failing to make payments under the FFA. But in any event, descriptions of preexisting law in a committee report are not probative indications of the law's meaning. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). We also cannot draw any reliable inference from the fact that Congress declined without explanation to enact a provision, proposed by DoD in 2010, that would have authorized DoD to pay for oversight costs incurred by EPA after the provision's enactment. *See* DoD Views at 4–7. As the Supreme Court has explained, unenacted legislative proposals are not reliable indicators of legislative intent. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993) ("As a general matter, we are 'reluctant to draw inferences from Congress' failure to act.'" (citations omitted)).